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5 **UNITED STATES DISTRICT COURT**  
6 **SOUTHERN DISTRICT OF CALIFORNIA**  
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8 BEST BUDDIES LEASING, LLC, a  
9 Nevada limited liability company,

10 Plaintiff,

11 vs.

12 CABRILLO YACHT SALES, et al.,

Defendants.

CASE NO. 07cv1121 BTM(AJB)

**ORDER GRANTING MOTION TO  
DISMISS; ORDER TO SHOW CAUSE**

13 Defendants Cabrillo Yacht Sales ("Cabrillo") and Dan Peters ("Peters") have filed a  
14 motion to dismiss Plaintiff's third and fourth causes of action for failure to state a claim upon  
15 which relief can be granted, or, in the alternative, a motion for a more definite statement. For  
16 the reasons discussed below, Defendants' motion to dismiss is **GRANTED**.  
17

18 **DISCUSSION**

19 **A. Fraud Claims**

20 The parties are familiar with the allegations of the Complaint which need not be  
21 repeated here.

22 Defendants move for dismissal of Plaintiff's third cause of action for intentional  
23 misrepresentation/fraud and fourth cause of action for negligent misrepresentation on the  
24 ground that Plaintiff has failed to plead the alleged fraudulent misrepresentations with  
25 particularity. The Court agrees that Plaintiff has not satisfied the heightened pleading  
26 requirements of Fed. R. Civ. P. 9(b).

27 Plaintiff's allegations in support of its fraud and negligent misrepresentation claims are  
28

1 vague and lacking in essential detail.<sup>1</sup> “Averments of fraud must be accompanied by the  
 2 who, what, when, where, and how of the misconduct charged.” Vess v. Ciba-Geigy Corp.,  
 3 USA, 317 F.3d 1097, 1106 (9th Cir. 2003). Plaintiff’s fraud and negligent misrepresentation  
 4 claims incorporate “each and every allegation set forth in the preceding paragraphs.” Upon  
 5 review of the preceding paragraphs, it is apparent that Plaintiff’s fraud claims are based in  
 6 part on the alleged representations by Peters, Cabrillo and/or Ta-Yang Building Company,  
 7 Ltd. (it is unclear exactly who made the representations), that the defects reported by  
 8 Plaintiff were covered by the warranty and would be cured within a reasonable time (Compl.  
 9 ¶ 46). However, it is unclear which other, if any, representations Plaintiff contends were  
 10 fraudulent.

11 In Plaintiff’s opposition papers, Plaintiff explains that the allegedly fraudulent  
 12 representations also include (1) representations by Cabrillo and Peters that they would  
 13 coordinate the filing of warranty claims and performance of warranty repairs (Compl. ¶¶ 24-  
 14 25); (2) representations by Cabrillo and Peters that they would provide drawings of the  
 15 electrical system, piping systems, pump systems, engine transmission systems, rigging and  
 16 sail systems, and stations of hull and deck, as well as cabinetry drawings (Compl. ¶ 23); and  
 17 (3) representations that Cabrillo and Peters were acting as escrow agents for Plaintiff  
 18 (Plaintiff alleges that they subsequently disbursed funds without permission and refused to  
 19 provide an accounting to Plaintiff) (Compl. ¶ 26.) The Complaint does not make clear that  
 20 these representations fall within the scope of the fraud claims.

21 The Court grants Plaintiff leave to amend its Complaint to clearly identify the allegedly  
 22 fraudulent representations in addition to the specifics of “who, what, when, where, and how,”  
 23 which are, for the most part, missing from the Complaint. The Court also cautions Plaintiff  
 24 that it must allege that Defendants harbored an intention not to perform the terms of the  
 25 contract or promises *at the time of formation*. It is not enough to allege, as Plaintiff does in  
 26 its opposition papers, that Plaintiff “relied on those promises, but that those promises went

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 28 <sup>1</sup> Plaintiff’s negligent misrepresentation claim is “grounded in fraud” and is therefore  
 subject to the pleading requirements of Rule 9(b). See Miller v. Allstate Ins. Co., 489 F.  
 Supp. 2d 1133, 1139 (S.D. Cal. 2007).

1 unfulfilled – either intentionally or recklessly.” (Opposition p. 6.) The mere breach of a  
 2 contract or failure to fulfill a promise does not give rise to a fraud cause of action.

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 4 **B. Order to Show Cause**

5       Upon review of the Complaint, it is unclear to the Court that diversity jurisdiction exists.  
 6 Plaintiff alleges that it is “a foreign limited liability company formed and existing under the  
 7 laws of the state of Nevada, whose principal place of business is diverse from all  
 8 defendants.” However, if Plaintiff was formed for the purpose of leasing the vessel at issue,  
 9 it seems that Plaintiff’s principal place of business would be here in California. Accordingly,  
 10 the Court orders Plaintiff to show cause why this case should not be dismissed for lack of  
 11 jurisdiction.

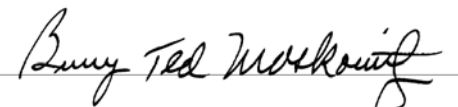
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 13 **CONCLUSION**

14       For the reasons discussed above, Defendants’ motion to dismiss the third and fourth  
 15 causes of action is **GRANTED**. The third and fourth causes of action are **DISMISSED**.  
 16 Plaintiff may file an amended Complaint that corrects the deficiencies identified above on or  
 17 before **December 21, 2007**. Defendants’ motion for a more definite statement is **DENIED**  
 18 **AS MOOT**.

19       Plaintiff is ordered to file a response to the Order to Show Cause (“OSC”) on or before  
 20 **December 17, 2007**. In its response, Plaintiff shall specify what its business consists of and  
 21 where its principal place of business is. The matter will be set for hearing on **December**  
 22 **21, 2007 at 11:00 a.m.** Unless otherwise directed by the Court, there shall be no oral  
 23 argument and no personal appearances are necessary.

24 **IT IS SO ORDERED.**

25 DATED: November 21, 2007

26   
 27 Honorable Barry Ted Moskowitz  
 28 United States District Judge